Supreme Court of the United States.

No. 98.—October Term, 1902.

The Osceola. } On certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[March 2, 1903.]

This was a libel *in rem* filed in the District Court for the Eastern District of Wisconsin, in admiralty, against the propeller Osceola, to recover damages for a personal injury sustained by one Patrick Shea, a seaman on board the vessel, through the negligence of the master.

The case resulted in a decree for the libellant, from which an appeal was taken by the owners to the Circuit Court of Appeals, which certified to this court certain questions arising upon the following statement of facts:

"The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed about 1,050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind, and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while the said vessel was at sea and running against the

wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which that court desired the advice and instruction of the Supreme Court are—

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

"Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

Mr. Justice BROWN delivered the opinion of the Court.

In the view we take of this case we find it necessary to express an opinion only upon the first and third questions, which are in substance whether the vessel was liable *in rem* to one of the crew by reason of the improvident and negligent order of the master in directing the hoisting of the gangway for the discharge of cargo, before the arrival of the vessel at her dock, and during a heavy wind. As this is a libel *in rem* it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or at common law, although cases upon this subject are not wholly irrelevant.

If the rulings of the District Court were correct, that the vessel was liable *in rem* for these injuries, such liability must be founded either upon the general admiralty law or upon a local statute of the State within which the accident occurred. As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both at home and abroad, we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Mr. Justice Bradley observed in *The Lottawanna*, (21 Wall. 558,) "having regard to our own legal history, Constitution, legislation, usages and adjudications."

By Article VI of the Rules of Oleron, sailors injured by their own misconduct could only be cured at their own expense, and might be discharged; "but if, by the master's order and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at

the cost and charges of the said ship." By Article 18 of the Laws of Wisbury, "a mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship," with a further provision that, if he be injured by his own recklessness, he may be discharged and obliged to refund what he has received. Practically the same provision is found in Article 39 of the Laws of the Hanse Towns; in the Marine Ordinances of Louis XIV, Book III, Title 4, Article 11; and in a Treatise upon the Sea Laws, published in 2 Pet. Admiralty Decisions. In neither of these ancient codes does there appear to be any distinction between injuries received accidentally or by negligence, nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure. We are also left in the dark as to whether the seaman in such a case has recourse to the ship herself or is remitted to an action against the owners.

By the modern French Commercial Code, (Art. 262,) "seamen are to be paid their wages, and receive medical treatment at the expense of the ship, if they fall sick during a voyage, or be injured in the service of the vessel." Commenting upon this article, Goirand says in his commentaries upon the French Code, that "when a sailor falls ill before the sailing of the vessel, he has no right to his wages; if he becomes ill during the voyage, and from no fault of his own, he is paid his wages, and tended at the expense of the ship," and if he is left on shore, the ship is also liable for the expense of his return home; and under Article 263 the same treatment is accorded to sailors wounded or injured in the service of the ship. The expenses of treatment and dressing are chargeable to the ship alone, or to the ship and cargo, according to whether the wounds or injuries were received in the service of the ship alone, or that of the ship and cargo."

Similar provisions are found in the Italian Code, Article 363; the Belgian, Article 262; the Dutch, Articles 423 and 424; the Brazilian, Article 560; the Chilian, Article 944; the Argentine, Article 1174; the Portuguese, Article 1469; the Spanish, Articles 718 and 719; the German, Articles 548 and 549. In some of these codes, notably the Portuguese, Argentine and Dutch, these expenses are made a charge upon the ship and her cargo and freight, and considered as a subject of general average. By the Argentine Code, Article 1174, the sailor is also entitled to an indemnity beyond his wages and cure in case of mutilation; and by the German Code he appears to be entitled to an indemnity in all cases for injuries incurred in defense of his ship; and by the Dutch Code, the sailor, if disabled, is entitled to such damages as the judge shall deem equitable. In all of them there is a provision against liability in case of injuries received by the sailor's wilful misconduct.

Except as above indicated, in a few countries, the expense and maintenance and cure do not seem to constitute a privilege or lien upon a

ship, since by the French Code, Article 191, classifying privileged debts against vessels, no mention is made of a lien for personal injury. The other Continental and South American codes do not differ materially from the French in this particular. Probably, however, the expenses of maintenance and cure would be regarded as a mere incident to the wages, for which there is undoubtedly a privilege.

By the English Merchants' Shipping Act, (17 & 18 Vic. chap. 104, sec. 228, subd. 1,) "if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to some port in the United Kingdom, if shipped in the United Kingdom, or if shipped in some British possession to some port in such possession, and of his conveyance to such port, and the expense (if any) of his burial shall be defrayed by the owner of such ship, without any deduction upon that account from the wages of such master, seaman or apprentice."

These provisions of the British law seem to be practically identical with the Continental codes. In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the owner. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the Merchants' Shipping Act of 1876, (39 & 40 Vic. chap. 80, section 5,) wherein in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. (*Hedley* v. *Pinkney &c. Steamship Co.*, (1894) App. Ca. 222, an action at common law.) Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. (*The Agincourt*, 1 Hagg. 271; *The Lowther Castle*, Ibid. 384.) This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that "in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. (*Hedley* v. *Pinkney &c. Steamship Co.*, (1894) App. Ca. 222.) It is

otherwise, however, in Ireland, (*Ramsay* v. *Quinn*, Irish Rep. 8 C. L. 322,) and in Scotland, where the master is regarded as a vice principal. (*Leddy* v. *Gibson*, 11 Ct. Sess. Cases, 3d Ser. 304.)

The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. The earliest case upon the subject is that of *Harden* v. *Gordon*, (2 Mason, 541,) in which Mr. Justice Story held that a claim for the expenses of cure in case of sickness constituted in contemplation of law a part of the contract for wages, over which the admiralty had a rightful jurisdiction. The action was *in personam* against the master and owner for wages and other expenses occasioned by the sickness of the plaintiff in a foreign port in the course of the voyage, all of which were allowed. The question of indemnity did not arise in this case, but the court held that upon the authority of the Continental codes and by its intrinsic equity there was no doubt of the seaman's right to the expenses of his sickness.

This case was followed in *The Brig George*, (1 Sumner, 151,) and in *Reed* v. *Canfield*, (1 Sumner, 195.) Though the last case did not involve the question of indemnity, Mr. Justice Story, in delivering the opinion, remarked that "the sickness or other injury may occasion a temporary or permanent disability, but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is what expenses have virtually been incurred for the cure."

The question of indemnity, however, was fully considered by Judge Brown of the Southern District of New York in *The City of Alexandria*, (17 Fed. Rep. 390,) which was an action *in rem* for personal injuries received by the cook in falling through the fore hatch into the hold; and it was held that upon common law principles the claim could not be sustained, as the negligence through which the accident occurred was that of fellow servants engaged in a common employment. The court, however, went on to consider whether the negligence, upon the recognized principles of maritime law, entitled the libellant to compensation from the ship or her owners in cases not arising from unseaworthiness. After going ower the Continental codes, the cases above cited and a few others, Judge Brown came to the conclusion that he could find "no authority in the ancient or modern codes, in the recognized text-books or the decisions

on maritime law for the allowance of consequential damages resulting from wounds or hurts received on board ship, whether arising from ordinary negligence of the seaman himself or from others of the ship's company. Considering the frequency of such accidents and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable beyond what has been stated is evidence of the strongest character that no further liability under the maritime law exists."

The general rule that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship was enforced in *The Atlantic*, (Abbott's Adm. 451,) though it was said in this case and in *Nevitt* v. *Clark*, (Olcott, 316,) that the privilege of being cured continues no longer than the right to wages under the contract in the particular case. In *The Ben Flint*, (1 Abb. U. S. Reps. 126; *S. C.*, 1 Biss. 562,) the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown* v. *Overton*, (1 Sprague, 462;) *Croucher* v. *Oakman*, (3 Allen, 185;) *Brown* v. *The Bradish Johnson*, (1 Woods, 301.)

In *The Edith Golden*, (23 Fed. Rep. 43,) the vessel was held liable *in rem* for personal injuries received from the neglect of the owner to furnish appliances adequate to the place and occasion where used. In other words, for unseaworthiness. This is readily distinguishable from the previous case of *The City of Alexandria*, (17 Fed. Rep. 930,) and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of the ship and her appliances. In *The Titan*, (23 Fed. Rep, 413,) the ship was held liable to a deck hand, who was injured by a collision occasioned partly by fault of his own vessel. The question of general liability was not discussed but assumed. In the case of *The Noddleburn*, (28 Fed. Rep. 855,) the question of jurisdiction was not pressed by counsel, but merely stated and submitted. The case is put upon the ground that, as the accident was occasioned by the master knowingly allowing a rope to remain in an insecure condition, the vessel was consequently unseaworthy. In *Olson* v. *Flavel*, (34 Fed. Rep. 477,) libellant was allowed to recover damages for personal injury suffered by him while employed as mate, but if there were any negligence on the part of the respondent, it appears to have been not providing proper appliances, so that the case was one really of unseaworthiness. In the case of *The A. Heaton*, (43 Fed. Rep. 592,) a seaman was allowed to recover consequential damages for negligence of the owners in not providing suitable appliances, although in the opinion, which was delivered by Mr. Justice Gray, he seems to assume the right of the seaman to recover against the masters or owners for injuries caused by their willful

or negligent acts. The case however was one of injuries arising from unseaworthiness, although the learned judge in his discussion does not draw a distinction between the cases arising from the unseaworthiness of the ship and the negligent act of the master. It is interesting to note that in *The Julia Fowler*, (49 Fed. Rep. 277,) a seaman, employed in scraping the main mast on a triangle surrounding the mast, was allowed to recover for the breaking of the rope which held the triangle, and precipitated libellant to the deck; while in a case almost precisely similar, (*Kalleck* v. *Deering*, 161 Mass. 469,) the owners were held not to be liable for an injury caused by the negligence of the mate in constructing the triangle and ordering the seaman to use it. In *The Frank and Willie*, (45 Fed. Rep. 494,) the ship was held liable to a sailor who was injured by the negligence of the mate in not providing safe means for discharging the cargo. As the opinion was delivered by Judge Brown, who was also the author of the opinion in *The City of Alexandria*, (17 Fed. Rep. 390,) the case can be reconciled with that upon the ground that the question was really one of unseaworthiness and not of negligence.

Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (*Scarff* v. *Metcalf*, 107 N. Y. 211.)

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876, above quoted, (*Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney*

&c. Co., 7 Asp. M. L. C. 135, (1894,) App. Cas. 222,) and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.

2. It is insisted, however, that a lien is given upon the vessel by a local statute of Wisconsin, (Rev. Stat. of 1898, sec. 3348,) repeating a previous statute upon the same subject, which provides that every ship, boat or vessel used in navigating the waters of that State shall be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel," and that the claim for such damages shall constitute a lien upon such ship, boat or vessel, which shall take precedence of all other claims or liens thereon. As the accident happened within three miles of the port of Milwaukee, and as the constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the State, there is no doubt that the vessel was navigating the waters of that State at the time of the accident. But the vital question in the case is whether the damages arose from an injury done to persons or property *by such ship*, boat or vessel. The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used. Would it apply, for instance, to injuries received in falling through an open hatchway? Or to a block blown against a seaman by the force of the wind, though the accident in either case might have resulted from the negligence of the master? We think not.

The act in this particular uses the same language as the seventh section of the English Admiralty Court Act of 1861, which declares that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Construing that act, it has been held by the Court of Admiralty that it applies to damages occasioned by a vessel coming in collision with a pier, (*The Uhla*, L. R. 2 Ad. & Ec. 29, note,) and also to cases of personal injury: *The Sylph*, Ibid. 24, where a diver, while engaged in diving in the river Mersey, was caught by the paddle wheel of a steamer and suffered considerable injury; but not to a case where personal injuries were sustained by a seaman falling down into the hold of a vessel, owing to the hatchway being insufficiently protected, (*The Theta*, 1894, P. D. 280,) or to loss of life, (*The Vera Cruz*, 9 P. D.

96.) As we have indicated above the statute was confined to cases of damage done by those in charge of a ship with the ship as the "noxious" instrument," and that cases of damages done *on board* the ship were not within the meaning of the act of damages done *by the ship*.

In the case under consideration the damage was not done by the ship in the ordinary sense of the word, but by a gangway, which may be assumed to be an ordinary appliance of the ship, being blown against the libellant by the force of the wind.

It results that the first and third questions must be answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.